

01 Among the deficiencies identified by the Court in its May 14, 2012 Order was that
02 petitioner failed to demonstrate that he had properly exhausted each of his federal habeas claims
03 in the state courts. (Dkt. No. 8 at 1-2.) The Court explained that a state prisoner is required to
04 exhaust all available state court remedies before seeking a federal writ of habeas corpus. 28
05 U.S.C. § 2254(b)(1). The exhaustion requirement is a matter of comity, intended to afford the
06 state courts “an initial opportunity to pass upon and correct alleged violations of its prisoners’
07 federal rights.” *Picard v. Connor*, 404 U.S. 270, 275 (1971) (internal quotation marks and
08 citations omitted). In order to provide the state courts with the requisite “opportunity” to
09 consider his federal claims, a prisoner must “fairly present” his claims to each appropriate state
10 court for review, including a state supreme court with powers of discretionary review.
11 *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citing, *Duncan v. Henry*, 513 U.S. 364, 365 (1995),
12 and *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

13 The Court noted that, while it appeared petitioner may have presented at least some of
14 his federal habeas claims to the state courts in some fashion, it was not clear that petitioner had
15 presented *each* claim to *each* appropriate state court for review. The Court explained that,
16 typically, a claim must be presented to both the Washington Court of Appeals and the
17 Washington Supreme Court before it becomes eligible for review by this Court.

18 A second deficiency identified by the Court in its May 14, 2012 Order was that
19 petitioner had not named a proper respondent in his federal habeas petition. (Dkt. No. 8 at 3.)
20 The final deficiency identified by the Court was that petitioner failed to demonstrate his petition
21 was timely. (*Id.*) The Court noted that the judgment under attack was entered in August 2006
22 and that it was therefore possible, even likely, that any challenge to that judgment would be

01 barred by the one year statute of limitations. (Dkt. No. 8 at 3.) Petitioner was granted thirty
02 days within which to correct the noted deficiencies and was advised that his failure to timely
03 correct the deficiencies could result in dismissal of his petition.

04 On May 21, 2012, petitioner filed an amended petition for writ of habeas corpus under
05 28 U.S.C. § 2254. A review of the amended petition reveals that many of the noted
06 deficiencies remain. While petitioner identified a proper respondent in his petition, he fails to
07 demonstrate that each of his federal habeas claims has been properly exhausted and he fails to
08 offer any clear explanation as to why he believes his petition is timely. The Court is not in a
09 position to make a conclusive determination regarding the timeliness issue because it does not
10 currently have access to the state court record. However, it appears clear, based upon the
11 information provided by petitioner, that petitioner has not presented any of the claims identified
12 in his amended petition to the Washington Supreme Court for review. Accordingly, petitioner
13 has not properly exhausted his claims and, thus, his claims are not eligible for federal habeas
14 review. This Court therefore recommends that petitioner's petition for writ of habeas corpus
15 and this action be dismissed without prejudice.

16 A petitioner seeking post-conviction relief under § 2254 may appeal a district court's
17 dismissal of his federal habeas petition only after obtaining a certificate of appealability (COA)
18 from a district or circuit judge. A certificate of appealability may issue only where a petitioner
19 has made "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C.
20 § 2253(c)(3). A petitioner satisfies this standard "by demonstrating that jurists of reason could
21 disagree with the district court's resolution of his constitutional claims or that jurists could
22 conclude the issues presented are adequate to deserve encouragement to proceed further."

01 *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under this standard, this Court concludes that
02 petitioner is not entitled to a certificate of appealability in this matter. A proposed order
03 accompanies this Report and Recommendation.

04 Any objections to this Recommendation must be filed no later than **September 11,**
05 **2012.** The Clerk should note the matter for **September 14, 2012**, as ready for the District
06 Judge's consideration. Objections shall not exceed five pages. The failure to timely object
07 may affect the right to appeal.

08 DATED this 21st day of August, 2012.

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11 BRIAN A. TSUCHIDA
12 United States Magistrate Judge
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